NO. 2014-CA-01657-COA

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

WATKINS DEVELOPMENT, LLC and DAVID WATKINS, SR.

PETITIONER-APPELLANTS

V.

C. DELBERT HOSEMANN, JR. in his official capacity as MISSISSIPPI SECRETARY OF STATE

RESPONDENT-APPELLEE

Appeal from the Chancery Court of Hinds County, Mississippi
Cause No. A2014-512

APPELLEE'S BRIEF

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Respondent-Appellee

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary of State for the State of Mississippi, C. Delbert Hosemann, Jr., in his official capacity (the "Secretary"), does not request nor believe oral argument is necessary and/or warranted in this case. The facts are generally not in dispute and the issues of law involve application of settled state and federal securities law.

STATEMENT OF ISSUES

1. The Chancellor correctly affirmed the Secretary's Final Order that Watkins violated Section 75-71-501(1) of the Mississippi Securities Act (the "Act") by failing to disclose his intentions to use bond proceeds from the Retro Metro Project for any purpose other than improvements to the Belk Building located in the Metrocenter Mall;

2. The Chancellor correctly affirmed the Secretary's Final Order that Watkins violated Section 75-71-501(2) of the Act by using Retro Metro bond proceeds to finance an unrelated business venture;

3. The Chancellor correctly affirmed the Secretary's Final Order that Watkins' misuse of the Retro Metro bond proceeds to finance an unrelated business venture violated Section 75-71-501(3) of the Act.[1]

4. The Chancellor correctly found Watkins' misrepresentations were material;

5. The Chancellor correctly found transfer of the bond proceeds in June 2011 from the Retro Metro Project to Meridian, LLC was "in connection with" the April 2011 bond transaction;

6. The Chancellor correctly found Watkins was afforded due process.

[1] The Chancellor reversed the Secretary's Final Order finding that Watkins violated Section 75-71-501(1) of the Act by failing to disclose the existence of a side agreement between Retro Metro and Watkins Development known as a Development Agreement. [R. 558]. The Secretary did not appeal the Chancellor's findings with respect to the Development Agreement and thus, the issue is moot for purposes of this appeal. Watkins does contend the Chancellor could not have reversed the Final Order as to the findings regarding Watkins' failure to disclose the Development Agreement, and yet affirm the Final Order Secretary as to the remaining counts regarding the improper use of the Retro Metro Bond Proceeds. Watkins bases this argument on the fact that because he was owed money for the project, he could use the bond proceeds however he wanted. As set forth below, Watkins is incorrect and these two issues are wholly distinct.

STATEMENT OF THE CASE

This is an appeal arising from an administrative proceeding by Watkins Development, LLC ("Watkins Development") and David Watkins, Sr. ("Mr. Watkins") (collectively "Watkins") from the Hinds County Chancery Court and the Chancellor's Opinion and Order dated November 19, 2014 affirming the Final Order of the Secretary imposing restitution, penalties and costs. [R. 536-570]. The Chancellor affirmed the Secretary's Final Order Imposing Restitution and Administrative Penalties ("Final Order"), dated March 24, 2014 which found Watkins violated Sections 75-71-501(2) and (3) of the Mississippi Securities Act, Miss. Code Ann. §§ 75-71-101, *et seq.* (2010) (the "Act"). [R. 569]. The Act authorizes the Secretary to regulate the sale of securities in Mississippi which includes any fraud in connection with the offer, sale or purchase of securities.

On July 13, 2013, the Secretary issued a Notice of Intent ("Notice") to Impose Administrative Penalty and Order Restitution and Disgorgement of Profit to Watkins. [Admin. R.E. 4; Admin. R. 3925-3932]. The Notice charged Watkins with violations of the Act in connection with the April 2011 sale of bonds issued by the Mississippi Business Finance Corporation ("MBFC") to be used to revitalize the Belk building (the "Building") at Metrocenter Mall in Jackson, Mississippi ("Metrocenter").

According to the overall plan, the City of Jackson (the "City") would lease the Building following the completion of the renovation. Lease payments from the City would service bond debt. As reflected in the transaction documents executed by Watkins, the bond proceeds were to be used solely to revitalize the Building and did not authorize him to use those bond proceeds for unrelated business activities.

However, Watkins did exactly that. The undisputed record which the Office of Secretary of State, Securities Division (the "Division") developed during the Administrative Hearing, shows that Watkins used more than a half a million dollars of the bond proceeds earmarked for the Building renovation to finance a wholly unrelated business venture in Meridian, Mississippi (the "Meridian Project"). To carry out the funding for the Meridian Project, Watkins used the payment requisition mechanism set up as part of the bond transaction documents.

Thus, the fraudulent misuse of a portion of the Retro Metro bond proceeds to finance the Meridian Project was in connection with the sale of the bonds in April 2011. Watkins' actions were material because the City did not take occupancy of the Building by the time the first bond payment came due, rental payments were not available to service the debt and the bonds defaulted.

In the end, Hearing Officer presiding at the Administrative Hearing, the Secretary by virtue of the Final Order, and the Chancellor, all found that Watkins violated the Act by misusing the bond proceeds to finance the Meridian Project. The facts are undisputed, the law is clear, and the penalties imposed are warranted. As set forth below, the Secretary respectfully requests that this Court affirm the Chancellor and dismiss the appeal.

Proceedings before the Division

On July 30, 2013, the Secretary issued a Notice of Intent to Impose Administrative Penalty and Order Restitution and Disgorgement of Profit ("Notice") to Watkins. [Admin. R.E. 3; Admin. R. 3925-3933].[2] The Notice stated, *inter alia*, that:

[2] Citations to the record herein are identified by citing to the Supreme Court record number (e.g., "R. XXX"), and where applicable, to the Administrative Record number from the proceedings before the Division (e.g. "Admin. R. XXX"). When Watkins appealed the Secretary's Final Order, the Division filed the Administrative Record with the Hinds County Chancery Court Clerk. The Administrative Record (approximately 5,000 pages) was filed conventionally with the Hinds County Chancery Clerk via a CD. On Appeal to this Court, the Hinds County Chancery Clerk transmitted the CD containing the Administrative Record to the Supreme Court Clerk via the same CD as an Exhibit to the Record on

(a) Based on statements made by Watkins Development as manager of Retro Metro, particularly the PPM, the Mississippi Business Finance Corporation as the conduit issuer, issued Taxable Revenue Bonds, Series 2011 Retro Metro LLC Project in the principle amount of $5,195,000.00, and loaned the proceeds to Retro Metro to finance the revitalizing of the Belk Building in the Metrocenter Mall in Jackson, Mississippi. The Bonds were issued on April 12, 2011.

(b) On April 12, 2011, the same date that the bonds were issued, Mr. Watkins, as Manager, formed Meridian Law Enforcement Center, LLC ("Meridian LLC") for the purpose of purchasing real property in Meridian, Mississippi and leasing the property to the City of Meridian for a police station. At that time, Watkins Development owned a 75% interest in Meridian LLC.

(c) On June 2, 2011, Watkins requisitioned a payment for construction costs on the Retro Metro Project and deposited those funds in the Retro Metro checking account.

(d) On June 8, 2011, Watkins, as Manager of Meridian LLC, caused $587,084.34 to be wired from Retro Metro's checking account with BankPlus to a real estate closing account for the law firm of Hammack, Barry, Thaggard, and May, LLP of Meridian, Mississippi.

(e) The $587,084.34 wired from Retro Metro's checking account was used to purchase real property in Meridian and the property is owned by Meridian LLC and leased from Meridian LLC to the City of Meridian.

[Admin. R.E. 3; Admin. R. 3926-27]. The Notice provided the Secretary reserved the right to amend the Notice. [Admin. R.E. 3; Admin. R. 3932, ¶ VIII]. The Notice was issued following an extensive investigation by the Division which concluded that Watkins had engaged in the following conduct prohibited by the Act:

(a) making an untrue statement of material fact or omitting to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading by failing to disclose that Retro Metro had material preexisting liabilities to Watkins Development in violation of Section 75-71-501(2) of the Act;

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appeal. To avoid duplicative citations and to lesson confusion, citations to the Administrative Record herein are only identified by citing to the Administrative Record ("Admin. R. or Admin. R.E.)

(b) failing to disclose in the bond documents, including the payment requisition forms the use of any portion of the bond proceeds to finance the activities of Meridian, LLLC constituting a violation of Section 75-71-501(2) of the Act; and

(c) engaging in an act and course of conduct that operated to mislead or deceive by misusing the bond proceeds in violation of Section 75-71-501(3) of the Act.

(d) employing a device, scheme, or artifice to mislead or deceive using proceeds for a purpose other than represented in the sale of the security in violation of Section 75-71-501(1) of the Act;

[Admin. R.E. 1; Admin. R. 4087].

On August 8, 2013, Watkins filed a Request for Hearing. [Admin.R. 3934]. On August 16, 2013, the Secretary appointed Robert R. Bailess as the Hearing Officer to preside at the Administrative Hearing. [Admin. R. 3935]. On August 28, 2013, the Hearing Officer issued an order setting the Administrative Hearing for October 29, 2013. [Admin.R. 3936]. On October 23, 2013, and in accordance with paragraph VIII of the Notice, the Secretary served on Watkins an Amended Notice of Intent. ("Amended Notice") [Admin. R.E. 4; Admin.R. 3948-3957].

Because of Amended Notice, counsel for the Secretary wrote the Hearing Officer and Watkins's attorney offering Watkins additional time to prepare for the Administrative Hearing and with leave of the Hearing Officer, to reschedule the October 29, 2013 Administrative Hearing for a later time. [Admin. R. 3848]. Following several email exchanges, Watkins, through his counsel, agreed to proceed with the Administrative Hearing as originally scheduled on October 29, 2013. [Admin. R. 3851].

The Administrative Hearing took place over a two-day period – October 29 and 30, 2013. Both parties presented witness testimony and submitted a number of exhibits. [Admin. R. 4110-

4259].[3] On March 19, 2014, the Hearing Officer submitted his proposed Findings of Fact and Conclusions of Law ("FFCL") to the Secretary. [Admin. R.E. 2; Admin.; Admin. R. 4065-4083]. On March 24, 2014, the Secretary entered a Final Order adopting the Hearing Officer's proposed FFCL with additions and modifications as set forth in the Final Order.[4] [Admin. R.E. 1; Admin. R. 4084-4089].

Evidence Presented to Hearing Officer and Considered by Chancellor

In 2010, the then-Mayor of Jackson discussed an initiative with Mr. Watkins to rebuild the Highway 80 corridor in Jackson, Mississippi which included Metrocenter. [Admin. R.E. 6; Admin. R. 4183]. According to Watkins, the Mayor asked him to help with the project, including the renovation of the Building at Metrocenter. [Admin. R.E. 6; Admin. R. 4183; Admin. R.E. 6; Admin R. 4184]. Thereafter, Watkins Development, Mr. Watkins's company, purchased the Building. [Admin. R.E. 6; Admin. R. 4184]. At the conclusion of the project, the City would lease space in the Building. [Admin. R.E. 5; Admin. R. 4318].

In August 2010, Watkins formed an entity called Retro Metro ("Retro Metro"). The sole purpose of Retro Metro was to renovate the Building (the "Retro Metro Project"). [Admin. R.E. 6; Admin. R. 4124-25]. Mr. Watkins was the Manager of Retro Metro.[5] [Admin. R. 4267]. Based on evidence from the Administrative Hearing, Watkins Development entered into a side-agreement with Retro Metro, referred to as a "Development Agreement" ("Development

[3] The Hearing Officer received sixty-four (64) documents into evidence. [Admin. R. 4112]. Those exhibits are part of record and incorporated herein.

[4] The Secretary is authorized to make modifications to the FFCL filed by the Hearing Officer pursuant to Miss. Code Ann. § 75-71-604(c).

[5] Mr. Watkins was the Managing Member of Watkins Development. [Admin. R.E. 7; Admin. R. 4291].

Agreement"), on February 21, 2011 as part of the Retro Metro Project.[6] [Admin. R.E. 2; Admin R. 4067; A.R.E. 7; Admin.R. 4282-4291].

The Development Agreement between Retro Metro and Watkins Development was the means by which Mr. Watkins intended to be paid the Retro Metro Project and was executed by Watkins Development through its Managing Member, Mr. Watkins, and by Retro Metro through its Managing Member, Mr. Watkins. [Admin. R.E. 7; Admin. R. 4291].[7] For reasons apparently known only to Mr. Watkins, he did not disclose the existence of the Development Agreement to the other parties to the transaction.

Representations by Watkins in Connection With the Retro Metro Project

Based on representations by Watkins Development, through Mr. Watkins as the Manager of Watkins Development, and as provided in the Private Placement Memorandum ("PPM") dated April 5, 2011, the MBFCC, as a *conduit issuer,*[8] issued Taxable Revenue Bonds, Series 2011 (the "Bonds") in the principle amount of $5,195,000.00. [Admin. R.E. 4; Admin. R. 3949; Admin. R.E. 5; Admin. R. 4292-4320]. Mr. Watkins also executed a Loan Agreement ("Loan Agreement") whereby the MBFC loaned the bond proceeds (the "Bond Proceeds") for the Retro Metro Project. [Admin. R.E. 4; Admin R. 3949; Admin. R.E. 5; Admin. R. 4292-4320]. As represented in the PPM, the Bond Proceeds were to be used solely to renovate the first floor of the Building at Metrocenter. The Bonds were issued on April 12, 2011 (the "Bond Transaction"). [Admin. R.E. 5; Admin. R. 4296; Admin. R.E. 10; Admin R. 4723].

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[6] At all relevant times, Mr. Watkins was the Manager of Watkins Development. [Admin. R. 3295].

[7] Thus, Mr. Watkins essentially entered into these two agreements with himself.

[8] A "conduit issuer" is an organization, usually a government agency, that issues municipal securities to raise capital for revenue-generating projects where the funds generated are used by a third party (known as the "conduit borrower") which develops the project and uses revenue generated from the project to make payments to investors.

In addition to the PPM and the Loan Agreement, Mr. Watkins, as the Managing Member of Retro Metro, also executed a Bond Purchase Contract ("Bond Contract") which provided that:

> The Company [Retro Metro] will not take or omit to take, as may be applicable, any action which would in any way, cause the proceeds of the Series 2011 Bonds *to be applied in a manner contrary to the requirements of the Indenture, the Loan Agreement and the Series 2011 Note.*

[Admin. R.E. 9; Admin. R. 4632, ¶ 4(b)] (emphasis supplied). The Bond closing took place on April 12, 2011 (the "Closing") and the Bonds were issued on the same date (the "Closing Date") [Admin. R.E. 10; Admin. R. 4723].

Structure of the Retro Metro Bond Transaction

The Bonds were issued pursuant to a Trust Indenture (the "Trust Indenture") between MBFC and BankPlus, as the trustee of the Bond Proceeds ("Trustee"). [Admin. R.E. 12; Admin. R. 4569]. BankPlus, as Trustee under the Trust Indenture, held the net Bond Proceeds in the amount of $4,875,000.00 in a construction account for Retro Metro (the "Construction Account") [Admin. R.E. 12; Admin. R. 4574; Admin. R.E. 6; Admin R. 4156]. As construction costs were incurred, Watkins was required to submit a requisition for payment to the Trustee. Exhibit C to the Loan Agreement set out the process by which these funds were to be drawn down in order to pay construction costs in connection with the Retro Metro Project. [Admin. R.E. 16; Admin. R. 4542-4543]. Once a requisition for payment was made, the Trustee would release the funds which were then deposited into Retro Metro's checking account.

Also, pursuant to the Loan Agreement executed by Watkins on behalf of Retro Metro, MBFC, through the Trustee, loaned the Bond Proceeds for the Retro Metro Project. The Chancellor found by substantial evidence that the Bond Proceeds were to be used solely for the purpose of the Retro Metro Project. [R. 559]. The Chancellor also found by substantial

evidence that Watkins did not use the Bond Proceeds for the required purpose, but instead used nearly $600,000 to finance the Meridian Project instead. [R. 559].

Evidence that Watkins Failed to Honor his Representations

On April 1, 2011, at the same time the Bond documents ("Transaction Documents") were being negotiated and prepared, Watkins formed a another business entity called Meridian , LLC to apparently develop the Meridian Project. This project had nothing to do with the Retro Metro Project but was simply another venture being undertaken by Watkins at that time. [Admin. R.E. 6; Admin R. 4169; Admin. R.E. 13; Admin. R. 4742]. The Chancellor found by substantial evidence that Transaction Documents, including the PPM, the Loan Agreement, and the Trust Indenture through which Watkins made certain representations, did not did not authorize Watkins use the Bond Proceeds for the Meridian Project. [Admin. R.E. 5; Admin. R. 4296].

The record is shows Watkins formed Meridian, LLC on April 1, 2011. [Admin. R.E. 13; Admin. R. 4742]. That same day, Watkins also executed the Loan Agreement for the Retro Metro Project. [Admin. R.E. 8; Admin. R. 4503]. However, Watkins did not file the Meridian, LLC certificate of formation on April 1, 2011 or in the few days after, but waited until April 12, 2011 to file the certificate with the Secretary. [Admin. R.E. 13; Admin R. 4742]. April 12, 2011 is the same date of the Closing. [Admin. R.E. 13; Admin. R. 4742-43].

Thus, while Watkins knew he had formed Meridian, LLC at the same time he was also negotiating the Retro Metro Project, he did not disclose that company's existence by filing the certificate of formation with the Secretary until the Closing Date. [Admin. R.E. 11; Admin. R. 4264]. Moreover, on the same day that he formed Meridian, LLC, Watkins executed the Loan Agreement, the funding mechanism for the Retro Metro Project including the payment requisition process. [Admin. R.E. 13]. Exhibit "C" to the Loan Agreement [Admin. R. 4542], required Watkins with each requisition for payment ("Requisition") from the Construction

Account, to "attach copies of invoices or other appropriate supporting documentation to the Requisitions." [Admin. R. 4744-4780].

On June 2, 2011, just fifty-one (51) days after the Closing, Watkins submitted a Requisition from the Construction Account for $800,000 identified as being for construction costs. [Admin. R.E. 14; Admin. R. 4752]. Immediately prior to June 2, 2011, the Retro Metro checking account had a balance of approximately $60,000.00. [Admin. R.E. 15; Admin. R. 4786]. Based on the evidence presented by the Division to the Hearing Officer, and as affirmed by the Chancellor, "[t]he schedule attached to Requisition # 3 only disclose[d] that [Watkins] request[ed] a distribution for 'Construction costs' (demolition, framing, Plumbing, electrical)' for $800,000." [Admin. R.E. 2; Admin. R. 4073; Admin. R.E. 14; Admin R. 4752-4754].

The Chancellor found based on substantial evidence presented to the Hearing Officer, that "Requisition #3 [did] not include any of the required supporting documentation for the payment other than a reference to "Construction Costs" nor [did] it include any supporting documentation for payments to Watkins Development or any description of things that could be payable to Watkins Development." [Admin. R.E. 2; Admin. R. 4073-4754; Admin. R.E. 14, Admin. R. 4752]. The Hearing Officer concluded and the Chancellor affirmed that "[b]y signing and submitting Requisition #3, [Watkins] made all the covenants and all the reps and warranties [made in the Loan Agreement on April 1, 2011]. . . ." [Admin. R.E. 2; Admin. R. 4073]. Thus, Watkins represented in Requisition #3 that the funds were for construction costs.

On June 8, 2011, just six (6) days after depositing $800,000 from the Trustee to Construction Account for the Retro Metro Project, supposedly for "Construction Costs" as represented in Requisition #3, Watkins wire transferred $587,084.34 from the Retro Metro checking account to a real estate closing account at a law firm in Meridian, Mississippi to

purchase real property for Meridian Project. [Admin. R.E. 2; Admin. R. 4073-74; Admin. R.E. 15; Admin. R. 4788].

The record is undisputed that the $587,084.34 wired by Watkins for the Meridian Project came from the Bond Proceeds requisitioned as construction costs for the Retro Metro Project. This is established by the fact that immediately prior to the $800,000 deposit from the Construction Account, Retro Metro had only $60,000 in its checking account. [Admin. R.E. 15; Admin. R. 4781]. The money Watkins requisitioned for construction costs for the Retro Metro Project therefore went to finance the Meridian Project instead.

The record also shows that Watkins was preparing for the closing on the Meridian Project at the time of the wire transfer of Retro Metro Bond Proceeds. [Admin. R.E. 2; Admin. R. 4074; Admin. R.E. 6; Admin. R. 4177]. Watkins' only purported justification for using Bond Proceeds for the Meridian Project was that "[*he*] *had a time – a serious time crunch that day.*" [Admin. R.E. 6; Admin. 4177] (emphasis supplied). Watkins also claimed that he did not have time to obtain an acquisition loan to purchase the property for the Meridian Project. [Admin. R.E. 2; Admin. R. 4072].

Retro Metro defaulted on Bond payments

These interrelated events are material to Watkins' violations of the Act because in the months after Watkins wired the $587,084.34 of Bond Proceeds to the Meridian Project, the Retro Metro defaulted on the Bond payments. [Admin. R.E. 2; Admin. R. 4074]. Retro Metro defaulted on Bond payments starting in April 2012 and remained one payment in default. [Admin. R.E. 6; Admin. R. 4124, 4127].

According to testimony at the Administrative Hearing by bond attorney, Keith Parsons,[9] he learned that the October 2011 Bond Payment for the Retro Metro Project, while made, had been paid out of the capitalized interest fund set up as part of the Bond transaction,[10] and that the April 2012 Bond payment was coming due causing concern that the April payment would not be made. [Admin. R.E. 6; Admin. R. 4124]. Mr. Parsons testified that "there were discussions going on about that and what the . . . problem was and it [the Retro Metro Project] was going to default, and then it went into default." [Admin. R.E. 6; Admin. R. 4124].

Mr. Parsons testified that $500,000 would have made a huge difference to Retro Metro's financial condition because it continued to be in default on the Loan Agreement in the amount of semiannual payments. [Admin. R.E. 6; Admin. R. 4127]. According to Mr. Parsons, the amount had been running in the $200,000 to $250,000 range. *Id.* Mr. Parsons testified that the City lease payments had been enough to get them "almost out of default right as the next payment [came] due, and they immediately [went] back into default. So yeah, $500,000 would have been the difference in being in default and not being in default." *Id.* Thus, the Hearing Officer found and the Chancellor affirmed – through the presentation of substantial evidence Watkins' representations concerning the use of the Retro Metro Bond Proceeds were material.[11] The

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[9] Mr. Parsons acted as bond counsel for the MBFC in the Retro Metro Bond Transaction [Admin. R.E. 6; Admin R. 4122].

[10] The capitalized interest fund was a reserve to make the first Bond payment in the event that the City of Jackson had not moved into the Belk Building and was not generating rent payments to service the debt service on the Bonds. [Admin. R.E. 5; Admin R. 318].

[11] While Mr. Parson was discussing an amount of money Watkins was to be paid as part of the Development Agreement, the amount of money is equally applicable with respect to the amount of the wire transfer by Watkins to the Meridian Project. Mr. Parson's testimony, as found by the Chancellor, supports that fact that transferring that amount of money from the Retro Metro Project was material. The Chancellor made this finding in his Opinion and Order stating that "Mr. Parson's testified at the hearing, that the sum of $500,000 would have made a difference to Retro Metro because it had defaulted on the Loan Agreement in the amount of its semi-annual payments." [R. 561; Admin. R. 4127].

Chancellor affirmed that, based on substantial evidence, Watkins violated Sections 75-71-501(2) and (3). [Admin. R.E. 2; Admin. R. 4079-4082].

Findings and Conclusions of Hearing Officer and Final Order of the Secretary

After review of written parties' briefs, exhibits and witness testimony during the Administrative Hearing, the Hearing Officer submitted his proposed FFCL to the Secretary on March 19, 2014. [Admin. R.E. 2; Admin. R. 4065-4083]. The Secretary, after review and consideration of the proposed FFCL and with some modification, issued a Final Order dated March 24, 2014, imposing monetary restitution, penalties and costs jointly and severally against Watkins and Watkins Development. [Admin. R.E. 1; Admin. R. 4084-4089]. The restitution, penalties and costs were imposed as follows:

(a) Twenty-Five Thousand Dollars ($25,000.00) for violating Section 75-71-501(2) of the Act;[12]

(b) Twenty-Five Thousand Dollars ($25,000.00) for violating Section 75-71-501(3) of the Act;

(c) Twenty-Five Thousand Dollars ($25,000. 00) for violating Section 75-71-501(2) and (3) of the Act.

(d) Restitution in the amount of $587,084.34 plus interest pursuant to Section 75-71-604(a)(3)(d) of the Act.

(e) Costs of the Secretary's investigation and administrative action totaling $18,047.39.

[Admin. R.E. 1; Admin. R. 4088].

The Secretary's Final Order affirmed the Hearing Officer that Watkins' use of the Bond Proceeds, including payment requisitions to finance the activities of an Meridian LLC, constituted a violation of Section 75-71-501(2) of the Act. [Admin. R. 1; Admin. R. 4087] the Hearing Officer also found, as reflected in the Secretary's Final Order and affirmed by the

[12] The Chancellor reversed the Final Order with respect to this fine.

Chancellor, that Watkins' misuse of the Bond Proceeds constituted an "act, practice, or course of business that operated or would operate as a fraud or deceit upon another person" in violation of Section 75-71-501(3) of the Act. [Admin. R. 1; Admin. R. 4087].

The Chancellor affirmed the findings of the Hearing Officer and the Secretary that Watkins used the Bond Proceeds for purposes other than making improvements to the Building and in so doing, violated Section 75-71-501(1) of the Act by employing a device, scheme, or artifice to mislead and deceive. [Admin. R.E. 1; Admin. R. 4087]. However, the Hearing Officer declined to levy a penalty for the violation of Section 75-71-501(1) and after reviewing the totality of the violations and penalties, the Secretary affirmed those findings and likewise did not impose a penalty against Watkins for violating Section 75-71-501(1) of the Act. [Admin. R.E. 1; Admin. R. 4087].

Watkins' Appeal to the Chancery Court

On April 17, 2014, Watkins filed a Petition for Review and Reversal of Final Administrative Proceeding, arising from the imposition of restitution and administrative penalties and costs imposed by the Secretary on March 24, 2014. [R. 4-15]. On May 16, 2014, the Secretary filed the Administrative Record from the administrative proceedings for purposes of Watkins's appeal. [R. 65-66]. On June 17, 2014, counsel for Watkins and the Secretary entered into an Agreed Briefing Schedule setting deadlines for the parties' respective appeal briefs. [R. 2]. On June 27, 2014, following recusal by all four (4) Hinds County, Mississippi Chancellors, the Supreme Court appointed Special Judge Hollis McGehee to preside. [R. 2]

On September 18, 2014, the Chancellor heard oral argument from counsel for Watkins and the Secretary lasting several hours. On November 19, 2014, the Chancellor issued his Opinion and Order ("Order") affirming three of four charges in the Secretary's Final Order. [R.

536-570]. The Chancellor, in a detailed thirty-five (35) page written opinion, made specific findings of fact and conclusions of law. [R. 536-570].

In affirming three of the four charges in the Secretary's Final Order, the Chancellor specifically found that the Final Order was supported by substantial evidence; was not beyond the power of the Secretary to make; and did not violate Watkins' statutory or constitutional rights as follows:

(a) "Watkins' failure to disclose in the Private Placement Memorandum or the bond Documents claimed significant and material liabilities of Retro Metro, LLC to Watkins Development as set forth in the Development Agreement is a violation of Section 75-71501(2) of the Act;" reversed . . .;

(b) When Watkins failed to disclose their intentions to use the Proceeds for any purpose other than the improvements for the Retro Metro project, Watkins violated Section 75-71-501(1) by employing a device, scheme, or artifice to mislead or deceive; is affirmed;

(c) Watkins' use of a portion of the Proceeds to finance the activities of Mississippi Law Enforcement Center, LLC is a material omission and violation of Section 75-71-501(2) of the Act; is affirmed;

(d) Watkins' misuse of the Bond Proceeds was and act and course of business that operated to mislead or deceive. This is in connection with the offer and sale of securities and is a violation of section 75-71-501(3) of the Act; is affirmed.[13]

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[13] The penalties were as follows:

(a) Twenty-Five Thousand Dollars ($25,000.00) for violating Section 75-71-501(2) of the Act; reversed;[13]

(b) Twenty-Five Thousand Dollars ($25,000.00) for violating Section 75-71(501(3) of the Act; affirmed;

(c) Twenty-Five Thousand Dollars ($25,000.00) for violating Section 75-71-501(2) and (3) of the Act; affirmed;

(d) $587,084.34 plus interest for restitution pursuant to the Secretary's authority under Section 75-71-604(a)(3)(d) of the Act; affirmed;

(e) $18,047.39 for the costs of the investigation and administrative proceedings.

[R. 570].

[Admin. R. 4087; R. 569].

SUMMARY OF THE ARGUMENT

The facts and law of this case are straight forward despite Watkins' obvious attempt to obfuscate the issues through self-serving justifications about why he used a portion of the Bond Proceeds for the Meridian Project.[14] The undisputed record before the Hearing Officer, affirmed by the Secretary and then again by the Chancellor, shows by substantial evidence that Watkins violated Section 75-71-501(2) and (3) of the Act in connection with the Project by misusing Bond Proceeds for an unrelated business venture in Meridian, Mississippi.

The Chancellor correctly affirmed the Secretary's Final Order that Watkins failed to honor the representations contained in the PPM – that the Bond Proceeds would be used for the revitalization of the Building at Metrocenter – when he transferred $587,084.34 of Bond Proceeds to a law firm in Meridian, Mississippi to finance another business venture. The Chancellor was correct in applying the Mississippi Supreme Court's recent decision in *Harrington v. Office of Miss. Sec. of State*, 129, So. 3d. 153 (Miss. 2013) in which the defendants, like Watkins, also failed to use money raised in a private stock offering in a manner represented in the private placement memorandum. Just as in *Harrington*, Watkins failed to use the Bond Proceeds for the purpose represented in the PPM and did so using the Requisition process to accomplish this task. [Admin. R. 559].

Applying the dictates of *Herrington* to this case, the Chancellor was also correct in finding that Watkins violated Section 75-71-501(3) of the Act by misusing the Bond Proceeds

[14] Throughout Watkins' brief he asserts that the Secretary has conceded various issues. These assertions are largely unilateral characterizations by Watkins of the Secretary's position on certain issues. Instead of addressing each instance where Watkins alleges the Secretary has supposedly conceded an issue, where he has not, the Secretary relies on the Administrative Record, the filings in this litigation and the arguments of counsel before the Chancellor below. Those reflect the Secretary's positions in this case, not Watkins' unilateral characterizations of the Secretary's position on a particular issue.

for the Meridian Project. [R. 563]. The Chancellor found that Watkins misuse of the Bond Proceeds for a purpose not authorized by the Transaction Documents constituted an act and course of business that operated to mislead or deceive and that the act was in connection with the sale of securities in violation of Subsection (3) of Section 75-71-501 of the Act.

The Chancellor was also correct in rejecting Watkins's self-serving justification for using the Retro Metro Bond Proceeds for a purpose unrelated to the Building renovation. Watkins argued that because he was owed more than $587,074.34, he was free to use the Bond Proceeds as he saw fit. The Chancellor was correct that "the actual transfer of the money, without any documentation supporting the validity of such action operates as a deceit pursuant to Section 75-71-501(3). *Harrington*, 129 So. 3d at 168.

As the record shows, Mr. Watkins did not transfer money from the Construction Account to make payment to himself for fees allegedly owed to him. Instead, he requisitioned $800,000 from the Construction Account held in trust by BankPlus as Trustee for Construction Costs. [Admin. R.E. 14; Admin. R. 4752]. If Watkins, who claims he "had the exclusive authority and responsibility to pay Retro Metro's bills" sought to pay himself from the Bond Proceeds, he could have easily done so. Instead, he used the Requisition process, claiming Construction Costs, and then used nearly seventy-five percent (75%) of that money to finance his other business venture. The Chancellor rightly rejected Mr. Watkins's cavalier argument as to the use of this money, and the Secretary urges that this Court should as well.

Watkins argues that he could not have known at any time in April 2011 – the month of the Closing – that in June of that year he would be required to transfer any funds for a purchase of the Meridian property by Watkins Development through Meridian, LLC. *See* Watkins Br. at p. 31, n.80. He also argues there is no evidence that he had "a state of mind in April of 2011 about

any aspect of a monetary transfer for the Meridian transaction which did not take place . . . until June of 2011." *Id.*

Repeatedly missed by Watkins throughout this case is that his state of mind (i.e., intent or lack thereof) is not relevant for violations under Sections 75-71-501(2) and (3) of the Act. However, even if intent was a necessary element, the was correct in affirming the Hearing Officer and Secretary that "[t]he clear overall finding by the Hearing Officer and ultimately by the Secretary *lay out an overall plan and continued set of actions which are all related that result in the misuse of the bond proceeds by Watkins/Retro Metro.*" [R. 562] (emphasis supplied).

This well-settled principle under federal law was recently re-affirmed by the Mississippi Supreme Court in *Harrington,* 129, So. 3d. at 164. Violations of subsections (2) and (3) of Section 75-71-501 of the Act ***do not require scienter*** – intent – but instead the "focus is on the effect of [Watkins'] conduct, rather than on [his intent]. *Harrington*, 129 S. 3d at 164. Here, the effect of Watkins's conduct was to use nearly $600,000.00 of Bond Proceeds – allegedly drawn for Construction Costs and used to finance another project instead. Retro Metro subsequently defaulted on its bond payments.

As further justification as to why he believes the Chancellor erred, Watkins alludes to what he calls "general introductory statement contained on one of 400-plus pages of the documents exchanged at (and leading up to) the April 12, 2011 bond sale." Watkins Br. at 19. While not explaining the significance of the number of pages of documents exchanged, the implication apparently being made by Watkins is that he did not read all of the Transaction Documents. He carries this argument a bit further that he was not the author of the statement relied on by the Chancellor in the PPM about purpose for the Bond Proceeds.

This argument rings particularly hollow given Watkins's testimony during the Administrative Hearing about his vast experience as a bond-attorney, particularly those involving public financing. Watkins testified that he had been involved in 727 bond transactions over a 20-year period and that 95% of those transactions involved publically financed contracts. [Admin. R.E. 5; Admin. R. 4236]. This argument, now vaguely cast by Watkins, that the provisions of the documents upon which the Chancellor's findings were based were either insignificant in his mind, or were just part of a voluminous set of closing documents, strains reason beyond the breaking point and should be afforded no credence.

Finally, Watkins says the use of the Bond Proceeds two months after the Closing to finance the Meridian Project was not material to the earlier bond sale in April 2011. While once again self-serving, the argument also fails under the applicable legal standard for "materiality" as well as the record evidence in this case. Watkins cannot credibly argue that money that he used and earmarked for Construction Costs to finance another project was not material, particularly in light of the fact that the Retro Metro Bonds went into default after Watkins transferred the Retro Metro Bond Proceeds to the Meridian Project. For the reasons set forth below, the Chancellor's findings should be affirmed in all respects and Watkins' appeal dismissed.

ARGUMENT

I. Standard of Review, the Secretary's Administrative Burden of Proof and Controlling Statutory Authority

A. Standard of Review

"'When this Court reviews a decision by a chancery or circuit court concerning an agency action, it applies the same standard of review that the lower courts are bound to follow.'" *Harrington v. Office of Miss. Sec. of State*, 129 So. 3d 153, 158 (Miss. 2013) (citing *Miss. Sierra Club, Inc. v. Miss. Dep't of Envtl. Quality*, 819 So. 2d 515, 519 (Miss. 2002)). "As for the

chancellor's review of factual findings, by statutory mandate, '[t]he findings of the secretary of state as to the facts, if supported by competent material and substantial evidence, are conclusive.'" *Id.* (citing Miss. Code Ann. § 75–71–601). "S]tatutory interpretation is a question of law that is reviewed de novo." *W.C. Fore v. Miss. Dep't of Revenue*, 90 So. 3d 572, 577 (Miss. 2012).

An administrative agency's decision will be reversed **only if** it: "(1) was unsupported by substantial evidence; (2) was arbitrary and capricious; (3) was beyond the power of the administrative agency to make; or (4) violated the complaining party's statutory or constitutional right." *Harrington,* 129 So. 3d at 158. Substantial evidence is "something less than a preponderance of the evidence but more than a scintilla or glimmer." *Id.* "The reviewing court is concerned only with the reasonableness of the administrative order, not its correctness." *Miss. Dep't of Envtl. Quality v. Weems*, 653 So. 2d 266, 280–81 (Miss. 1995) (internal citations omitted).

An agency's interpretation of a rule or statute governing the agency's operation is a matter of law that is reviewed de novo, but with great deference to the agency's interpretation. *Sierra Club v. Miss. Envtl. Quality Permit Bd.*, 943 So. 2d 673, 678 (Miss. 2006) (quoting *McDerment v. Miss. Real Estate Comm'n*, 748 So. 2d 114, 118 (Miss. 1999)). This "duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate." *Gill v. Miss. Dep't of Wildlife Conservation*, 574 So. 2d 586, 593 (Miss. 1990).

For purposes of reviewing whether an agency's finding is supported by substantial evidence, "substantial evidence" is not an especially large quantum. *Mississippi Dept. of Transp. v. Rutland*, 965 So. 2d 696 (Miss. Ct. App. 2007). Importantly, reviewing courts are not to

substitute their judgment for that of administrative agencies when the latter act within areas of their decision-making authority. *Mississippi Dept. of Corrections v. Smith*, 883 So. 2d 124 (Miss. Ct. App. 2004). It is not the function of the reviewing court on appeal to determine whether the action of the agency is right or wrong, correct or incorrect, wise or unwise, advisable or best fitted to the situation involved; if there is substantial evidence to sustain the legal action of the legislative agency, the court will not substitute its judgment for that of the agency. *Falco Lime, Inc. v. Mayor and Aldermen of City of Vicksburg*, 836 So. 2d 711 (Miss. 2002).

For purposes of viewing whether an agency's finding is arbitrary or capricious, the terms arbitrary and capricious imply "a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." *St. Dominic–Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 910 So. 2d 1077, 1082 (¶ 15) (Miss. 2005) (quoting *HTI Health Servs. of Miss., Inc. v. Miss. State Dep't of Health*, 603 So. 2d 848, 851 (Miss. 1992)). An arbitrary act is not done according to reason or judgment, but on will alone. *Miss. Methodist Hosp. & Rehab. Ctr. v. Miss. Div. of Medicaid*, 21 So. 3d 600, 610 (¶ 25) (Miss. 2009) (citation omitted). It is "absolute in power, tyrannical, despotic, non-rational – implying either a lack of understanding of or a disregard for the fundamental nature of things." *Id.* Capricious means "freakish, fickle," or "done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." *Id.*

As set forth, the Division submitted substantial, and in many instances, undisputed evidence, to the Hearing Officer regarding the misrepresentations, omissions and acts constituting fraud on the part of Mr. Watkins and Watkins Development under Section 75-71-501 of the Act. Based on this substantial evidence, the Secretary entered the Final Order imposing restitution, administrative penalties and costs. The Chancellor, in affirming the Final Order, likewise found

that the Secretary had submitted substantial evidence. The Secretary respectfully requests that the Court affirm the Chancellor's Opinion and Order.

B. Burden of Proof in the Administrative Proceedings

Rule 817(B) of the Mississippi Securities Act Rules provides that "[u]nless otherwise specified by law, the standard of proof at the [Administrative Hearing] shall be by a preponderance of the evidence. This preponderance standard has been upheld by the United States Supreme Court in federal antifraud cases. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-89; *see also Steadman v. SEC*, 450 U.S. 91, 92, 96 (1981).

The Mississippi Supreme Court recently affirmed this burden of proof in cases brought by the Secretary under state law in light of Rule 817(B). *See Harrington,* 129 So. 3d at 161. ("While common law fraud does require clear and convincing evidence, the United States Supreme Court has held that 'the antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud,' and the Supreme Court has upheld the preponderance of the evidence standard in federal antifraud cases."). *Id.* In this matter, the Division more than met its burden of proof of a preponderance of evidence at the Administrative Hearing.

C. The Mississippi Securities Act

The Act, amended in 2010, authorizes the Secretary to regulate the sale of securities in Mississippi, including any offer, sale or purchase of securities that involves fraud. Section 75-71-501, General Fraud [Effective January 1, 2010] of the Act, provides that "[i]t is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly,

(1) To employ a device, scheme, or artifice to defraud,

(2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person."

Miss. Code Ann. § 75-71-501. Section 501 of the Act requires a hybrid of proof depending on the subsection being charged. This owes to the fact that Section 75-71-501 incorporates elements of Section 17(a) of the Securities Act of 1933 (1933 Act), Section 10b of the Securities Exchange Act of 1934 (1934 Act), and Securities and Exchange Commission ("SEC") Rule 10-5, promulgated under the 1934 Act.

The United States Supreme Court has addressed the issue of when the SEC Commissioner, (and by analogy, the administrator of the State agency) must prove *scienter* (intent) as an element of an enforcement action. *See Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680 (1980). In *Aaron* the Court held that the SEC must establish scienter as an element of a civil enforcement action to enjoin violations of Section 17(a)(1) of the 1933 Act, Section 10(b) of the 1934 Act, and Rule 10b-5 promulgated under the 1934 Act, but that scienter is not a required element in enforcement actions under Sections 17(a)(2) and 17(a)(3) of the 1933 Act. *Aaron*, 446 U.S. at 701-02.

The *Aaron* decision is significant in this case because the Mississippi Supreme Court in *Harrington* undertook a comprehensive analysis of Mississippi's securities law and said with respect to scienter that:

> Sections 17(a)(2) and (a)(3) of the federal Securities Act are identical to Mississippi Code Sections 75–71–501(2) and (3). Those subsections are "devoid of any suggestion" of a scienter requirement, and the focus is on the effect of [Respondents'] conduct, rather than on their intent. Scienter is not a required element for charges brought under Mississippi Code Sections 75–71–501(2) and (3), which are the only sections at issue here. Therefore, the hearing officer and chancellor did not err by not making a specific finding regarding scienter, because they were not required to do so.

Harrington, 129 So. 3d at 164 (internal citations omitted). Thus, in an enforcement action brought by the Secretary under the Act, proof of scienter is only a required element in an action

arising under Section 75-71-501(1), but for enforcement actions arising under Section 75-71-501(2) and (3).[15] Thus, the Secretary was not required to prove Watkins acted with intent when he misused the Retro Metro Bond Proceeds for the Meridian Project.

II. Watkins Violated Section 75-71-501(2) of the Act by Using Retro Metro Bond Proceeds to Finance the Meridian Project.

It is undisputed that Watkins wired $587,084.34 of Bond Proceeds earmarked as an $800,000 draw for Construction Costs on June 8, 2011 to a law firm in Meridian, Mississippi for use in the purchase of property for Meridian Project. [Admin. R.E. 2; Admin. R. 4073-4074; Admin. R.E. 15; Admin. R. 4788]. On this point, the Chancellor concluded that:

> The Secretary [ ] presented substantial evidence that **Mr. Watkins did not honor the representations contained in the PPM** (that the Bond Proceeds would be used for the revitalization of the Metrocenter Mall) when he transferred $587,084.34 of Retro Metro Bond Proceeds to a law firm in Meridian, Mississippi to purchase property for another unrelated project.

[R. 561, ¶ 55] (emphasis supplied).

It is undisputed that the Transaction Documents did not authorize Watkins to use the Bond proceeds for any purpose other than revitalizing the Building at Metrocenter. [Admin. R.E. 5; Admin. R. 4304]. The Chancellor found by substantial evidence that Watkins represented through the Transaction Documents that the Bond Proceeds would be used solely to renovate the Building. [Admin. R.E. 2; Admin R. 4081]. Specifically, the PPM contained the following representation specifying the use of the Bond Proceeds:

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[15] This hybrid statutory framework is used in many other states throughout the country. *See, e.g., Trivectra v. Ushijima,* 112 Hawai'i 90, 104, 144 P.3d 1 (Hawai'i 2006) (quoting Sen. Stand. Comm. Rep. No. 231 in 1957 Senate Journal, at 521). The Supreme Court of Hawaii further said:

> A review of the jurisprudence of other states that have enacted USA 1956 reveals an almost unanimous interpretation of section 101, as enacted in the respective states, as (1) being rooted in section 17(a) of the Securities Act of 1933, not section 10(b) of the Securities Exchange Act of 1934; and (2) concluding that no proof of scienter is required to establish a civil violation of the state equivalent of section 17(a)(2) or (a)(3).

[Admin. R. 3984] (footnotes omitted).

> The Bonds will be issued under and pursuant to a Trust Indenture, dated as of April 1, 2011 (the "Indenture"), by and between the Issuer and BankPlus, a Mississippi state bank with a corporate trust office in Ridgeland, Mississippi, as trustee (the "Trustee"). The Bonds will be limited obligations of the Issuer, payable only from specified sources as more fully described herein. *The proceeds of the Bonds are being loaned by the Issuer to Retro Metro, LLC, a Mississippi limited liability company (the "Company") pursuant to a Loan Agreement dated as of April 1, 2011 (the "Loan Agreement"), by and between the Issuer and the Company to improve the Metrocenter shopping center located in the City of Jackson, Hinds County, Mississippi (the "Facility"), as described herein under "THE PROJECT".* All of the Issuer's rights under the Loan Agreement will be assigned to the trustee as security for the payment of the principal of, premium, if any, and interest on the Bonds, except for certain rights to fees and indemnification payments.

[ADMIN. R.E. 5, 4296, 4305] (emphasis supplied). THE PROJECT is defined specifically in the PPM as follows:

> The proceeds of the sale of the Bonds will be used to finance the acquisition and improvements to the first floor of an existing building commonly known as the "Belk Building" in the Metrocenter shopping center located in the City of Jackson, Hinds County, Mississippi.

[Admin. R.E. 5; Admin. R. 4304]. It is clear that use of the Bond Proceeds was limited to the purpose set forth in the PPM, not for any purpose for which Watkins saw fit. It is also undisputed that Watkins failed to honor that representation when he used $587,084.34 of for the Meridian Project. Just as in *Harrington* where the sellers did not use the stock proceeds as represented by the PPM, Watkins did not honor the representations in the PPM that the Bond Proceeds would be used solely for the Building. [Admin. RE. 5, Admin. R. 4296]. Just as in *Harrington*, Watkins violated Section 75-71-501(2) of the Act.

A. Watkins' Justification for using the Bond Proceeds for the Meridian Project is Meritless.

Watkins contends the Chancellor erred in finding that the transfer of Retro Metro Bond Proceeds to his Meridian Project violated Sections 75-71-501(2) and (3) of the Act. Watkins

argues that "[h]e was legally entitled to receive that fee amount [$587,084.37] (and more) on that date as a matter of contract law then Watkins owned the funds, and had every legal right to have them directed to whatever lawful purpose [he] decided was in [his] own interest, including the purchase of property on behalf of its entity MLEC in Meridian." Watkins' Br. at 25.

Chastising the Chancellor's analysis as "nonsense," Watkins argues that "[i]f Retro Metro owed that money on that June 2011 day to Watkins Development because of its Development Agreement (as the Chancellor elsewhere had ruled it did), then that legal obligation on that day to disburse that money to the benefit of Watkins Development *was* entirely 'relevant' to any proper legal analysis of the legality of the disbursement." Watkins' Br. at 25 (emphasis original).

Watkins' argument is not only grossly cavalier, but is belied by the Transaction Documents. The Chancellor concluded that "no monies were withdrawn by Retro Metro from the Retro Metro accounts to pay any alleged debt owed by Retro Metro to Watkins and no requisitions for payment were submitted to the Trustee that referred to Retro Metro debt owed to Watkins Development." [Admin. R. 4744-4780; R. 551]. Moreover, the Chancellor correctly found that "[r]epayment to Watkins Development for acquisition costs had already been paid out of the [Retro Metro] Construction Account on April 12, 2011 as part of Requisition #1." [Admin. R. 4744-4747, 4781-4084; R. 551]. As noted by the Chancellor, Watkins provided no proof to support the alleged debt, other than the fees allegedly owed to Watkins under the Development Agreement. [Admin. R. 3925-3932,, 3948-3957, 4111-4246; R. 551].

Through Requisition #'s 1, 2, and 3, Watkins represented to the Trustee that Retro Metro had already incurred costs of $2,550,000.00. [Admin. R. 4747-4749; R. 549]. However, according to the American Institute of Architects ("AIA") draw requests, the total amount of

construction completed as of June 24, 2011 was only $959,382.90. [Admin. R. 4758-4760; R. 549].[16]

The record shows that between April 12, 2011 and June 7, 2011, Watkins caused $3,800.000 to be paid from the Construction Account to the Retro Metro checking account and over $2,943,000 to be paid from the Retro Metro Account. [Admin. R. 4781-4804; R. 549]. However, Watkins failed to submit any evidence at the Administrative Hearing, including invoices or records for accounts payable or accounts receivable, for the Retro Metro Project. [Admin. R. 4240; R. 549]. And Watkins did not submit evidence of the amount of the debt he claims he was owed from Retro Metro.

So what Watkins has suggested is that he was perfectly within his right to pay himself by concealing the disbursement of Bond Proceeds to Watkins Development by using the requisition process set forth in the Loan Agreement. It is undisputed that the money used by Watkins to fund the Meridian Project was money he requisitioned through the funding mechanism set up for the Retro Metro Project and identified in Requisition # 3 as "Construction Costs." [Admin. R.E. 14; Admin. R. 4752]. As found by the Chancellor, Watkins requisitioned a disbursement for $800,000 within days of the Meridian property purchase. [R. 560]. The Chancellor stated that "[b]y submitting such requisition, Mr. Watkins *renewed on that date the covenant made in the*

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[16] As part of the Retro Metro Project, Watkins made the following Requisitions for payment:

- **Requisition #1:** payment for construction costs - **$1,250,000** [Admin. R. 4744-4756];
- **Requisition #2:** payment for construction costs - **$500,000** [Admin. R. 4747-4749].
- **Requisition # 3:** payment for construction costs - **$800,000** [Admin. R.E. 14; Admin. R. 4752-4753];
- **Requisition # 4:** payment of **$200,000** [Admin R. 4747-4749; R. 549];
- **Requisition # 5:** payment of **$300,000** [Admin R. 4747-4749; R. 549];

Loan Agreement that the Bond Proceeds would be used to finance the Retro Metro Project. [Admin. R 4079; R. 560] (emphasis supplied). Further highlighted by the Chancellor is the fact that Watkins understood there would be no acquisition loan for the Meridian Project. [R.560].

Further still, the Chancellor concluded, based on substantial record evidence, that the "original sale/bond documents had provisions for how to draw down funds. That very process was used to accomplish the transfer to Retro Metro and subsequently to [the Meridian Project]. The transfer was in direct conflict with the original sale documents and purposes." [R.561]. Finally, the Chancellor stated that "[c]learly the Secretary was correct in finding that Watkins' actions violated the Act." [R. 561].

Watkins also makes much of the fact that the Chancellor reversed the Secretary's Final Order that failure to disclose the existence of the Development Agreement is a violation of Section 75-71-501(2). Watkins Br. at 19-26. According to Watkins, it is not possible that the Chancellor could have found Watkins did not violate the Act by failing to disclose the Development Agreement, and yet, still have found he violated Sections 75-71-501(2) and (3) by misusing the Bond Proceeds to finance another business venture.

Here, Watkins grossly conflates the two issues in an effort to convince the Court that he was free use the Bond Proceeds as he saw fit because Retro Metro allegedly owed Watkins Development under the terms of the Development Agreement. This argument is totally fallacious and begs the question – then why did Watkins disguise what he claims was money owed to Watkins Development as a Requisition for construction costs related to the Retro Metro Project? Moreover, the record is undisputed that Watkins offered no proof as to the amount owed to Watkins Development at that point in time. [R. 565]. So what he is left with is an unsubstantiated claim that he was owed money from Retro Metro and was free to use money that

had been requisitioned from the Trustee of the funds for construction costs." The Chancellor rightly rejected this argument and so too should this Court.

In the end, Watkins's purported justification for the transfer of Bond Proceeds to an unrelated business venture is without merit.

III. Watkins Violated Section 75-71-501(3) of the Act by Engaging in an Act, Practice, or Course of Business that Operated as a Fraud, or Deceit.

As found by the Hearing Officer and affirmed by the Secretary and the Chancellor, Watkins misuse of the Bond Proceeds constituted an act and course of business that operated to mislead or deceive in connection with the sale of securities and constituted a violation of Section 75-71-501(3) of the Act. In the Final Order, the Secretary modified paragraph 75 of the Hearing Officer's proposed Findings of Fact and Conclusions of Law as follows:

> As in the *Harrington* case, the private placement memo in the case at hand had a promise that the bond proceeds would be used 'to improve the approximately 120,000 square foot first floor of an existing building commonly known as the "Belk Building" in the Metrocenter shopping center located in the City of Jackson, Hinds County, Mississippi.' That promise was not honored when the money was instead used to purchase property in Meridian, Mississippi. And just as in *Harrington*, false statements of the use of the money were made in the offering document and misuse of the investors' money was deceitful and misleading.

[Admin. R.E. 1; Admin. R. 4086]

The Chancellor held that "this finding by the Secretary is supported by the Supreme Court's holding in *Harrington* which found:

> [T]he plain language of Section 75-71-501(3) does not contemplate the actual commission of a fraud, but rather 'any act, practice[,] or course of business which operates or would operate as a fraud or deceit[.]' (Emphasis added). Accordingly, there exists no applicable statutory requirement that fraud be proven at all; it is enough to satisfy the statute by showing the existence of an act, practice or course of business that would operate as a deceit.

[R. 564].

The Chancellor was also correct when he said that:

> [T]he "circumstances in this case are functionally the same as in *Harrington.* Mr. Watkins made certain promises in the PPM and related Bond documents that the Bond Proceeds would be used for the Belk Building revitalization. Instead, Mr. Watkins used $587,087.34 of that money to fund the [Meridian Project]. Through his conduct and actions, Mr. Watkins failed to use the Bond Proceeds in the manner specified in the PPM thus violating subsection (3) of Section 75-71-501.

[R. 564].

Just as in *Harrington* where the sellers promised to hold the stock offering proceeds in escrow for a period of time, but instead later used the stock proceeds in a manner inconsistent with those representations and promises in the private placement memorandum, Watkins too used the Bond Proceeds in a manner inconsistent with the representations in the PPM and related Transaction Documents.

Also, as in *Harrington* where the investors lost their money, the Bonds went into default. Thus, the conduct on the part of Watkins was clearly material. As noted by the Chancellor, "[a]lthough Mr. Watkins argued that he was owed more than $587,000.00 through the Development Agreement, the Court finds that the Hearing Officer was correct that whether or not the money was owed was irrelevant." [Admin. R. 4082; R. 565].

The Chancellor, quoting from the Hearing Officer, noted that "'[t]he actual act of the transfer, particularly without any paperwork documenting the validity of such an obligation [to Watkins Development] *would operate as a deceit.'*" [Admin. R. 4082; R. 565]. Furthermore, the Chancellor was correct that the "[t]he clear overall finding by the Hearing Officer and ultimately by the Secretary lay out an overall plan and continued set of actions which are all related that result in the misuse of bond proceeds by Watkins/Retro Metro." [R. 562].

The Chancellor rejected Watkins' argument that he had the right to expend from the Retro Metro Construction Account more than $2,000,000 in professional fees and other non-

construction expenses and beyond the amount required to improve the Building to accommodate the City of Jackson as a tenant. Here, the Chancellor correctly found that:

> [A]s determined by the Hearing Officer, the Loan Agreement and the definition of "Costs" does not support the argument of Watkins. Further, the Hearing Officer concluded that, pursuant to the definition of "Surplus Bond Proceeds" set forth at page ten (10) of the Loan Agreement, those amounts would not have been available to Watkins. The Court agrees with the findings and conclusions of the Hearing Officer and Secretary, and thus, Watkins' arguments are without merit.

[R. 565-66].

The Chancellor correctly found based on the Administrative Record the Secretary's Final Order that Watkins violated Section 75-71-501(3) of the Act is supported by substantial evidence, is not arbitrary or capricious, was within the Secretary's statutory authority and did not violate Watkins' statutory or constitutional rights. [R. 566].

IV. Watkins' Misrepresentations were Material.

According to Watkins, the use of the Bond Proceeds in June 2011 for his Meridian Project was not material to the April 2011 bond sale. Watkins' Br. at 33. He is wrong both legally and factually. The question of materiality is an objective standard that involves the significance of an omitted or misrepresented fact to a reasonable investor. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976). Materiality is not judged abstractly, but rather in light of the surrounding circumstances. *Krim v. Banctexas Group, Inc.*, 989 F.2d 1435, 1448 (5th Cir. 1993). In *TSC Industries*, the United States Supreme Court held that the standard for materiality is as follows: "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries*, 426 U.S. at 449.

Proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote is not required. *Id.* There must be a substantial likelihood

that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix of information made available." *Id.* Although the Court in *TSC Industries* was considering a claim brought under Rule 14a-9 of the 1934 Act, the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), adopted the *TSC Industries* standard for materiality for § 10(b) and Rule 10b-5 context. The violation in this case is not asserted under § 10(b) or Rule 10b-5, but since SEC Rule 10b-5 is the basis, in part, for Mississippi's § 75-71-501, the definition of materiality used in *TSC Industries* applies with equal force in this case. For instance:

> The Second Circuit applied the *TSC Industries* standard to claims arising under section 11 of the 1933 Act in *Kronfield v. Trans World Airlines, Inc.*, 832 F.2d 726, 731 (2d Cir. 1987). Given the almost identical language which Rule 10b-5 and section 11 use to describe how a misrepresentation can arise, *see supra* note 8 [the *Isquith* court agrees] with the Second Circuit that *TSC Industries* definition of materiality is equally applicable to a section 11 claim. Cf. *Simpson v. Southeastern Investment Trust*, 697 F.2d 1257, 1259 (5th Cir. 1983) (expressly adopting, for claims arising under section 12(2) of the 1934 Act's similar language, Rule 10b-5's definition of materiality.

Isquith v. Middle South Utilities, 847 F.2d at 207-208, n.16. As the *TSC Industries* definition has been applied to various sections that use similar language, the *TSC Industries* standard for materiality should also be applied when considering a violation of § 75-71-501 of the Act which uses similar language to § 17(a) and SEC Rule 10b-5. Indeed, the Mississippi Supreme Court in 2007 agreed:

> An omission is considered material if there is "a substantial likelihood that [its disclosure] would have been viewed by a material investor as having significantly altered the 'total mix' of information made available." "[I]f the alleged misrepresentation or omissions are not so obviously unimportant to an investor that reasonable minds cannot differ on the question of materiality [it is] appropriate for . . . [a] court to rule that the allegations are inactionable as a matter of law."

Qualcomm Inc. v. Am. Wireless Licenses Grp. LLC, 980 So. 2d 261, 272 (Miss. 2007) (internal citations omitted). Contrary to and despite Watkins' assertion that the omission was not material

to the decision to buy the securities, substantial evidence was presented to the Hearing Officer that the amount of money paid to Watkins Development via the undisclosed Development Agreement was a material fact that would have altered the total mix of information made available.

As the Chancellor found:

> Here, the record demonstrates that Mr. Watkins, through the PPM, made representations regarding the use of the use of the proceeds that were not true and that he engaged in a practice that was fraudulent or deceitful. *Id.* The Court finds that the transfer of the $587,084.34 from the Retro Metro Construction Account to the MLEC project was material. Mr. Parsons testified at the hearing that the sum of $500,000 would have made a difference to Retro Metro because it had defaulted on the Loan Agreement in the amount of semi-annual payments.

[R. 559; Admin. R. 4127]. In the final analysis, the Chancellor found that "[a]s in *Harrington* where the investors lost their money, the Retro Metro Bonds went into default." [R. 565; Admin. R. 4124, 4127]. "Thus, the Court finds that the conduct on the part of Mr. Watkins was material." [R. 565]. The record is not in dispute and the Secretary urges that the Chancellor's findings in this regard be affirmed.

V. Watkins' Violations of Sections 75-71-501(2) and (3) were "in Connection with" the Sale of Securities under the Act.

Watkins seeks to avoid liability arguing that his misuse of the Bond Proceeds in June 2011 to finance the Meridian Project was not in connection with the April 2011 bond sale and thus he could not Watkins Br. at 27. This argument, while not only brazen, is also predicated on a misapplication of both U.S. Supreme Court and Fifth Circuit precedent interpreting the phrase "in connection with."

Unlike Watkins, the Chancellor correctly applied the dictates of *Zandford* and the further application by the Fifth Circuit when considering the applicable statutory language. The Chancellor correctly found that the Secretary applied the Act. Moreover, the Chancellor found

that the Secretary is entitled to deference with respect to the application of the Act. [R. 562]; *see Sierra Club v. Miss. Envtl. Quality Permit Bd.*, 943 So. 2d 673, 678 (Miss. 2006).

A. The June 2011 Transfer of Bond Proceeds to the Meridian Project was in Connection With the April 2011 Bond Transaction.

Watkins argues the use of the Bond Proceeds to finance the Meridian Project was not "in connection with" the April 2011 sale of bonds as required by the statutory language of the Act. Watkins Br. at 27-33. Here, Watkins is simply wrong and the Chancellor was right finding the Secretary correctly applied the language of the Act to this case. As the starting point, Section 75-71-501 of the Act requires that the fraud, be "in connection with" the offer, sale, or purchase of a security, *directly or indirectly*." Significantly, the "in connection with" requirement has been given a broad reading by the United States Supreme Court and not the narrow interpretation sought to be applied by Watkins. The Supreme Court has said that:

> Rule 10b-5, which implements [Section 10(b) of the 1934 Act], forbids the use 'in connection with the purchase or sale of any security,' of 'any device, scheme or artifice to defraud' or any other 'act, practice, or course of business' that 'operates . . . as a fraud or deceit.' Among Congress' objectives in passing the Act was to 'insure honest securities markets and thereby promote investor confidence' after the market crash of 1929. More generally, Congress sought "'substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.'"
>
> Consequently, we have explained that the statute should be "construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.' In its role enforcing the Act, the SEC has consistently adopted a broad reading of the phrase "in connection with the purchase or sale of any security."

S.E.C. v. Zandford, 535 U.S. 813, 819 (2002) (internal citations omitted). Applying *Zandford* Watkins's fraud, i.e., the misuse of Bond Proceeds, was "in connection with" the April 11 2011 Bond Transaction in April 2011. Under just a minimal amount of scrutiny and logic, Watkins's interpretation of "in connection with" falls apart. Watkins claims that because he purportedly did not decide until June 8, 2011 to use Bond Proceeds to finance the Meridian Project, the

fraudulent act of diverting the Bond Proceeds to another project does not "coincide" with the sale of the securities in April of 2011 and therefore cannot be "in connection with under Section 75-71-501 of the Act. Watkins Br. at 27.

Thus, under Watkins's misguided interpretation of *Zandford*, as long as he waited some unspecified length of time after the Closing before using the Bond Proceeds for an unauthorized purpose his fraud cannot be "in connection with" the sale of securities. Notably, Watkins's efforts to separate the April 2011 Bond Transaction from the Meridian Project are completely undercut by the sequence of events regarding the negotiation of the Retro Metro Project and the creation of Meridian LLC and the fact that Watkins knew he did not have the necessary financing in place to fund the Meridian Project. Moreover, Watkins offers an interpretation of *Zandford* that would place an expiration date on fraud.

Not only is his argument not supported by the plain reading of *Zandford*, it is also foreclosed by case law cited by the Supreme Court in *Zandford*. *See United States v. O'Hagan,* 521 U.S. 642, 117 S. Ct. 2199, 138 L.Ed.2d 724 (1997). In *O'Hagan,* the Court held that the defendant committed fraud 'in connection with' a transaction when he used misappropriated confidential information for trading purposes. *Id.*

According to the Court, "the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities." *O'Hagan*, 521 U.S. at 656. Here, Watkins made representations in April of 2011 regarding the manner in which the Bond Proceeds would be used. [Admin. R.E. 5; Admin. R. 4296]. Thus, through the sale of those securities to be used for the revitalization of the Building in Metrocenter , he obtained funds that he then later used to purchase property for another project he was undertaking not authorized by the Transaction Documents.

Thus, as in *O'Hagan*, the fraud in this case was not consummated at the Closing on April 12, 2011 and Watkins acquired access to the Bond Proceeds through the Loan Agreement, but rather the fraud was consummated when he diverted the Bond Proceeds to the Meridian Project. Thus, as the Court in *O'Hagan* found, the securities transaction and the breach coincided. Watkins had a duty to use the Bond Proceeds to renovate the Building and the breach of this duty coincided with his diverting a portion of those Bond Proceeds to the Meridian Project.

B. Watkins' Interpretation of *Zanford* – that that the Fraud *Must* "Coincide" With the Sale of the Security – is also wrong.

Watkins' reading of *Zandford* to ***mandate*** that the fraud must **coincide** with the sale of the security is unfounded. In *Zandford*, the SEC filed a civil complaint alleging a stock broker violated both § 10(b) of the 1934 Act and SEC's Rule 10b-5 by selling his customer's securities and using the proceeds for his own benefit without the customer's knowledge or consent. *Id.* The question was whether the alleged fraudulent conduct was "in connection with the purchase or sale of any security" within the meaning of the rule.

The seller in *Zandford* maintained the sale of the securities occurred lawfully and the later misappropriation of the proceeds did not have the requisite connection with the sale of the securities. *Id.* The United States Supreme Court disagreed. *Zandford*, 535 U.S. at 819. The Court stated that the scheme to defraud and the sale of securities "coincided" but the Court did not hold that it was necessary for the fraud and sale to coincide. *Id.* Contrary to Watkins' assertion, there is no case law which mandates that the fraud and sale coincide in order to be "in connection with."

In *Harrington*, the Court found a violation of Section 75-71-501(2) and (3) of the Act despite the fact that the misrepresentations (deposit investors' funds into an escrow account and maintain books and records) occurred after the sale of the securities and without regard to

whether the respondents intended to use the proceeds in a manner contrary to the representations made in the PPM. The same is true here. Thus, Watkins's interpretation of *Zandford* is not a license to argue that a subsequent misuse of the Bond Proceeds cannot be considered "in connection with" the original sale of the securities.

There was substantial evidence presented to the Hearing Officer that in the days leading up to the transfer of $587,084.34, from the Retro Metro account to the Meridian Project, Mr. Watkins knew the Meridian closing was going to be hurried, that there would be no acquisition loan for the project, and that due to his Requisition for "construction costs" there was a cash reserve in the Retro Metro checking account in an amount sufficient to pay for the Meridian Project closing. [Admin. R.E. 2; Admin. R. 4079]. Moreover, Watkins made no other preparations for financing the Meridian Project other than preparing the Requisition and requesting $800,000 to be deposited into the Retro Metro account. [Admin. R.E. 6; Admin. R. 4072].

Based on the holdings of *Zandford* and *Harrington*, there can be no dispute that the fraud through the use of the Bond Proceeds, committed by Watkins occurred in connection with the sale of securities in violation of the Act. The Chancellor was correct and any other interpretation would allow the seller of securities to use the proceeds for any purpose, without authorization or consent of the purchaser, as long as the seller waits a sufficient amount of time to commit the fraud by diversion of the Bond Proceeds to an unapproved use.

Watkins relies on *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012) for the proposition that in order for a transaction to be "in connection with" it must "coincide." Watkins Br. at 28, n.75. Watkins tries to apply a reading to the term "in connection with" not adopted by the Fifth Circuit in *Roland*. Specifically, the Court in *Roland* said that "we find the Ninth Circuit's test from Madden, which is that 'a misrepresentation is 'in connection with' the purchase of a sale or sale

of securities if there is a relationship in which the fraud and the stock sale coincide ***or are more than tangentially related,'*** to be the best articulation of the 'coincide' requirement. *Roland*, 675 F.3d at 510-20 (emphasis supplied). There can be no dispute based on the sequence of events between April and June of 2011, Watkins' misuse of the Bond Proceeds for the Meridian Project was more than tangentially related to the April 2011 bond sale.

While Watkins repeatedly argues that for a transaction to be "in connection with" it must "coincide," the test adopted by the Fifth Circuit clearly is more expansive than Watkins application. The Chancellor, in considering both *Zandford* and *Roland*, determined that the Secretary applied the "in connection with" language of the Act appropriately. Thus, Watkins' reliance on *Roland* is misplaced and the Chancellor was correct in rejecting his analysis.[17] The Chancellor, in rejecting Watkins' argument that his subsequent use of the Bond Proceeds for the Meridian Project was not "in connection with" the April 2011 bond sale, succinctly stated that:

> Watkins actions go beyond simply using proceeds from the sale of securities in a subsequent transaction or event which happens to be "fraudulent". Here the securities sale itself, with its attendant terms and conditions, having as its purpose the renovation of the Metro Center Mall, through Retro Metro lead directly to and was used as a conduit for funneling money into a totally unrelated project of Watkins. The very terms upon which the bond[ ] sale was predicated was also the mechanism or vehicle used by Watkins to funnel money away from the promised renovation to another project.

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[17] The Chancellor gave considerable attention to Watkins' argument about the statutory language:

> Watkins very ably argues that the Secretary's findings are not entitled to deference because he failed to interpret the undisputed actions of Watkins/Retro Metro as being "in connection with." While Watkins argument is, at first, persuasive, if the court looks only to the words employed by the Secretary, however, when the findings themselves are looked at as a whole, **Watkins argument crumbles.** The clear overall finding by the Hearing Officer and ultimately by the Secretary lay out an overall plan and continued set of actions which are all related that result in the misuse of the bond proceeds by Watkins/Retro Metro. The court finds, when the record is carefully examined, the Secretary's findings are entitled to deference here. [R. 562] (emphasis supplied).

> Watkins' actions, considering the overall fact pattern, as found by the hearing officer and the Secretary, arise out of and are in connection with the sale of securities. This seems to be exactly the type of scenario contemplated when the court have held that the Act should not be read restrictively but rather be read to accomplish the remedial purposes of the Act yet must be in connection with the sale of securities. The undisputed facts here and the Secretary's interpretation and application of the Act to the same appropriately finds the balance between the requirements of *Roland* and the remedial language of *Zandford, supra.* Watkins' challenge of the Secretary's interpretation of the statutory terms fails. The Secretary has properly interpreted the statutory terms and properly applied them to he essentially undisputed facts herein.

[R. 562-63].

Beyond every shadow of a doubt, Watkins' misuse of the Bond Proceeds in June 2011 was in connection with the April 2011 Bond Transaction. The Chancellor correctly affirmed the Hearing Officer and the Secretary.

VI. Watkins' Characterization of *Harrington* is wrong.

According to Watkins, the instant case is unlike *Harrington* and the Chancellor erred by relying on the holding for this case. Watkins argues that this case is different from *Harrington* because in *Harrington,* the sellers "had no intention of fully honoring" their specific representation to the buyers about what would happen to their invested funds." Watkins Br. at 37. Watkins cites to page 157 of the *Harrington* decision suggesting that the Supreme Court found the sellers "*had an intent*" to defraud investors at the time of the sale. *Id.* This is simply inaccurate as the Supreme Court did not find the seller's in Harrington intended to defraud the purchasers. This is because in *Harrington*, the sellers were charged under Sections 75-71-501(2) and (3) of the Act, which as has been previously addressed, do not require any intent on the part of the person charged.

Watkins's claim that this case is different from *Harrington* is simply a mischaracterization of its holding. This case is just like *Harrington* because Watkins made representations in the PPM and Loan Agreement that he failed to honor and Retro Metro

defaulted on the bond payments. As opposed to the misleading and cherry-picked language used by Watkins, the full text from which those words were drawn is as follows:

> The Summary Order against SteadiVest indicated that the Division began investigating SteadiVest in May 2009 after receiving a consumer complaint about the company. The Division alleged that SteadiVest was a Ponzi scheme and that it had "mislead [sic] and deceived its investors in order to pay off mounting debt and keep its numerous subsidiaries afloat." *The Division accused SteadiVest of "mislead[ing] investors through a PPM [...]* ***which SteadiVest had no intention of fully honoring; through material misstatements of its CEO, Marshall Wolfe; and through material omissions in sales presentations and materials presented to its investors."*** A Final Cease and Desist Order against SteadiVest was executed on January 5, 2010.

Harrington, 129 So. 3d at 157 (emphasis supplied). Thus, what is clear from the entire context of the Court's statement in *Harrington* is that the Court was summarizing the allegations of the Secretary and was not making a finding that the sellers had acted with intent to deceive investors. *Harrington* clearly stands for the proposition that for violations under Sections 75-71-501(2) and (3), the Secretary is not required to prove intent.

This is precisely why *Harrington* controls the findings against Watkins under subsections (2) and (3) of Section 75-71-501. It matters not if Watkins did not intend to use the Bond Proceeds in a manner not permitted Transaction Documents, although the Chancellor agreed that Watkins' conduct did show an overall plan to misuse the Bond Proceeds. The fact, which is undisputed, is that Watkins used the Bond Proceeds to finance the Meridian Project which violated the promises in the PPMM.

As the Chancellor correctly found, the Secretary presented substantial evidence that Mr. Watkins did not honor the representations in the PPM and that just as in *Harrington* where sellers failed to use the proceeds as dictated by the PPM, Watkins likewise failed to use the Bond Proceeds in a matter required by the Transaction Documents. [R. 561]. "As the *Harrington*

Court stated, 'making untrue statements and engaging in practices that are or would be fraudulent or deceitful is prohibited.'" [R. 561] (citing *Harrington*, 129 So. 3d at 168).

VII. Watkins' Claim that the Contents of Post-Sale Requisition Forms are not Relevant to any Proof of Securities Fraud is Without Merit.

Watkins begins this argument as he did an earlier one stating that "[t]he hundreds of documents passed among the parties at the April 12, 2011 bond closing included a form for later use in making requisitions by Watkins as Manager of Retro Metro LLC, for the disbursement of bond proceeds by the Bank which served as the trustee of the bond proceeds." Watkins Br. at 40. While Watkins makes no specific argument with respect to the number of documents making up the Transaction Documents, he apparently seeks to justify his actions due to the volume of documents involved. This argument, while not only legally irrelevant, is also without merit given Watkins's testimony concerning the number of bond transactions to which he has been involved in as a bond-attorney. [Admin. R.E. 6; Admin. R. 4236].

As for the merits of the argument that the Requisition documents are not relevant, here again Watkins is wrong and the Chancellor succinctly and correctly disposed of this argument in his Opinion and Order stating that "[t]he original sale/bond documents had provisions for how to draw down the funds. That very process was used to accomplish the transfer to Retro Metro and subsequently to MLEC [the Meridian Project]." [R. 561]. "The representations (misrepresentations) which the Secretary found false and misleading, about the basis for drawing down those funds were also directly related to and essential to the original sale of securities. Clearly the Secretary was correct in finding that Watkins' actions violated the Act." [R. 561].

More particularly, the Chancellor aptly pointed out that "[b]y submitting such requisition, Watkins *renewed on that date the covenant made in the Loan Agreement that the Bond Proceeds would be used to finance the Retro Metro Project.*" [Admin. R.E. 8; Admin. R. 4507; Admin. R

4079; R. 560] (emphasis supplied). Thus, each time Watkins drew funds down from the Trustee through the Requisition process, he was affirming the covenant in the Loan Agreement that he would use the funds for the Building – not as Watkins says "as he saw fit." The Requisition documents, which Watkins deems irrelevant, were an integral part of the Bond Transaction to ensure the proper use of the funds. Watkins' argument to the contrary is without merit.

VIII. Watkins was Afforded Due Process.

Watkins claims that his rights to due process were violated during the agency proceedings because neither the original Notice, nor the Amended Notice informed him that there was any allegation of fraud regarding the Requisition forms.[18] Watkins argues that he had "no pre-hearing notice to prepare to present evidence concerning any such requisition or invoice." Watkins Br. at 43. This claim is without merit. The Amended Notice provided, *inter alia*:

> 12. Of the total Proceeds of $5,195,000.00 held in the construction account, Watkins, as manager of Watkins Development, as manager of Retro Metro, with signature authority, over a period of five (5) months, from April 2011 to September 2011, *caused $4,875,043 to be transferred from the Construction Account into a checking account held by Retro Metro with BankPlus (the "Retro Metro Account") which account was to be used for the sole purpose of the Project.*
>
> 14. On June 8, 2011, Watkins as manager of Watkins Development, as manager of Retro Metro, caused $587,084.34 to be wired from the Retro Metro Account to a real estate closing account for the law firm of Hammack, Barry, Thaggard, and May, LLC of Meridian, Mississippi.
>
> 15. The $587,084.34 wired from the Retro Metro Account was used to purchase real property located at 510 22nd Avenue, Meridian, Mississippi. Said real property is currently owned by MLEC and leased from MLEC to the City of Meridian.

[18] On October 23, 2013, the Division offered Watkins, with the consent of the Hearing Officer, to continue the hearing until a later date. Counsel for Watkins agreed to proceed with the hearing as scheduled on October 29, 2013. Therefore, is issue is without merit.

[Admin. R.E. 4; Admin. R. 3951] (emphasis supplied). The "requisitions" which form the basis of Watkins' due process challenge were the mechanism by which the Trustee was to transfer the money from the Construction Account to the Retro Metro checking account, and which is all set forth in the Loan Agreement executed by Watkins on April 1, 2011. [Admin R.E. 8].

Further, paragraph 12 of the Amended Notice clearly sets forth that Watkins caused to be transferred the amount of $4,875,043.00 from the Construction Account to Retro Metro's checking account and paragraph 14 clearly sets forth the fact that Watkins, as Manager of Watkins Development, as Manager of Retro Metro, caused $587,084.34 to be wire transferred from the Retro Metro Account to a law firm in Meridian, Mississippi which was used to purchase real property in Meridian, as set forth in paragraph 15.

The fact that the Amended Notice did not specifically refer to the specific documents which were used to facilitate the transfer of money by Watkins in paragraphs 14 and 15, e.g. "requisition forms," in no way can be construed as not placing Watkins on notice, prior to the October 29, 2013 hearing, that the Division intended to charge Watkins with improper use of funds, including the transfer of funds for unauthorized use.

The Supreme Court's decision in *Holt v. Mississippi State Bd. of Dental Examiners*, 131 So. 3d 1271 (Miss. Ct. App. 2014) precludes the argument being advanced by Watkins:

> Courts have never required that there be a particular form of notice or that particular procedures be adopted in order to satisfy constitutional due process requirements. [D]ue process is not a fixed content unrelated to time, place and circumstances. [D]ue process is flexible and calls for such procedural protections as the particular situation demands. The fundamental requirement of due process is simply the opportunity to be heard at a meaningful time and in a meaningful manner. [T]he formalities of practice, procedure, and evidence are relaxed in all administrative proceedings, including those concerning licenses. Further, due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.

Id. at 1279-80 (emphasis supplied) (internal citations and quotation marks omitted). Watkins received a Notice and an Amended Notice and was given the opportunity by the Division to continue the Administrative Hearing after the Amended Notice was issued; through counsel, Watkins declined that invitation and proceeded with the Administrative Hearing as scheduled. Thus, Watkins' argument that the Amended Notice "filed six days" before the hearing, rings hollow.

Furthermore, the Amended Notice clearly provides that the Division intended to challenge the transfer of money from the Construction Account to the Retro Metro checking account between April and September of 2011 and further challenge the wire transfer of $587,084.00 from the Retro Metro Account to a law firm in Meridian, Mississippi for another project. Under *Holt*, Watkins was provided notice "reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and to afford [him] an opportunity to present his objections." *Holt*, 131 So. 3d at 1280. This due process claim is without merit.

CONCLUSION

For the reasons set forth, the Secretary respectfully requests that the Court affirm the Chancellor's Order upholding the Secretary's imposition of restitution, administrative penalties and costs as set forth in the Opinion and Order and that the appeal be dismissed.

THIS the 31st day of July 2015.

Respectfully Submitted,

C. DELBERT HOSEMANN, JR., in his Official Capacity as MISSISSIPPI SECRETARY OF STATE

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CERTIFICATE OF SERVICE

I, Douglas T. Miracle, Special Assistant Attorney General for the State of Mississippi, do hereby certify that on this date I electronically filed the foregoing document with the Clerk of this Court using the MEC system, which sent notification of this filing to:

J. Brad Pigott, Esq.
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THIS the 31st day of July, 2015.

/s/ Douglas T. Miracle
DOUGLAS T. MIRACLE